Supreme Court, U.S.
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No. 91-159

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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IN RE ALAN J. and MARY FRANCES ANTWEIL,
husband and wife,
HOBBS PIPE & SUPPLY, a general partnership,
and MORRIS R. ANTWEIL,
*Debtors.*

WILLIAM BARNHILL,
*Petitioner,*

v.

ELLIOT JOHNSON, Trustee,
*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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### QUESTION PRESENTED FOR REVIEW, OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The Question Presented for Review, Opinions Below, Jurisdiction and Statutes Involved sections of the Petition for Writ of Certiorari (hereinafter referred to as the

"Petition") are adequate and require no clarification or further comment by Respondent.

## STATEMENT OF THE CASE

Respondent believes that the recitations contained in the Statement of the Case section of the Petition are correct but incomplete.

Respondent was appointed trustee of Debtors' bankruptcy estates on May 15, 1986. A liquidating Chapter 11 plan which consolidated Debtors' bankruptcy estates was confirmed on May 16, 1988.

Petitioner's only responsive pleadings filed in the Bankruptcy Court below were motions to dismiss. Petitioner never raised any 11 U.S.C. § 547(c) defense.

In the proposed amendments to the Complaint which are the subject matter of this appeal, Respondent alleges that the check was delivered to Petitioner or his agents on November 18, 1985, dated November 19, 1985 and honored by the drawee bank on November 20, 1985. Based on prior rulings of some of the courts below, which rulings are not part of this appeal, the parties agree that November 20, 1985 is "on or within 90 days before the date of the filing of the petition" but that November 19, 1985 is outside of this 90 day period. 11 U.S.C. § 547 (b)(4)(A). Both the District and Bankruptcy Courts below correctly stated that denial of the Trustee's Motion to Amend and dismissal of his complaint (which in its unamended form alleges transfer on November 19, 1985) would be appropriate if the proposed amendments would not withstand a motion to dismiss. *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337, 342 (D.N.M. 1990); and *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69, 69 (Bankr. D.N.M. 1989) quoting *In re Stattler's, Inc.*, 73 Bankr. 780, 785 (Bankr. S.D.N.Y. 1987). Accordingly, the date a check is honored must be capable of being the date of transfer for purposes of Section 547(b)(4) for Respondent's proposed amendments to be allowed.



On appeal to the Tenth Circuit, Respondent raised three issues: (1) that transfers occurs when a check is honored by the drawee bank for purposes of Section 547(b)(4); (2) alternatively, if the date of delivery is typically the date the check is transferred under Section 547(b)(4), that the date of honor controls in cases where a check is postdated; and, (3) if the Tenth Circuit ruled in favor of Respondent on the second ground (i.e. delivery controls except in cases of postdated checks), that the District Court had improperly made a finding of fact on the issue of the parties' intent with respect to the check at issue. The Tenth Circuit reversed the lower courts under the first theory, *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), rendering moot the remaining two issues.

If this Court both grants Writ of Certiorari and reverses the decision of the Tenth Circuit, the appropriate remedy is a remand to the Tenth Circuit for further proceedings regarding the remaining grounds for appeal. It is this Court's long standing policy to decline to review issues not addressed by the courts below absent exceptional circumstances. *See e.g. Youakim v. Miller*, 425 U.S. 231, 234 (1976). No exceptional circumstances exist. Accordingly, a ruling in favor of Petitioner should not resolve this case.

## RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT

The first reason enunciated by Petitioner for granting a writ for certiorari, namely that the courts are divided on a question presented, is described correctly. *See* Petition at 5-6. As Petitioner states, there are four United States Court of Appeals which clearly have resolved the question presented in the Petition and there is a direct conflict among those rulings. This Court sometimes exercises its discretion and grants writs of certiorari to resolve such conflicts. Sup. Ct. R. 10.1(a).

Petitioner's second reason is that there is a need for uniform application of provisions in the Bankruptcy Code. Petition at 7. Despite Petitioners apparent reliance on the case to the contrary, *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945), does not stand for the proposition that bankruptcy law requires uniform application, but instead is a case where this Court granted review of important questions of federal law decided by state court. *Id.* at 367. While certainly an interesting issue in the narrow field of preference litigation, the question presented in this case is not "an important question of federal law which has not, but should be, settled by this Court." Sup. Ct. R. 10.1(c).

Third, Petitioner states that "the decision below creates a conflict between the provisions of the Bankruptcy Code and the provisions of the Uniform Commercial Code." Petition at 7. Petitioner's contention is erroneous. The decision is correct. The holding that a check does not operate as a transfer of funds of the drawer until it has been honored by the drawee bank is consistent with Section 3-409(1) of the Uniform Commercial Code. 931 F.2d at 694.

Petitioner's reliance upon Section 3-503 of the Uniform Commercial Code is misplaced. Section 3-503 merely provides that presentment of a check within thirty days of the date appearing on its face is a reasonable time for presentment. That section neither provides that a check presented within thirty days of the date on the face of the check operates as an assignment of the drawer's funds as of the date appearing on the check nor guarantees that a check presented within that time frame will be honored. Section 3-503 defines what a stale check is for the payee, the drawee bank and all other intermediaries in the collection process. Presentment of a check which is stale and is dishonored can result in a discharge of liability of endorsers and, under certin circumstances, drawees by operation of Section 3-502. *Grist v. Osgood*, 90 Nev. 165,



521 P.2d 368, 368 (1974); and *Wildman Stores, Inc. v. Carlisle Distributing Co.*, 15 Ark. App. 11, 688 S.W.2d 748, 749 (1985) (both discussing the interaction between U.C.C. §§ 3-502 and 3-503).

The mention of Section 3-503 in the legislative history to Section 547 is of no moment. In the legislative history, Congress has acknowledged that its intent to adopt a transfer on delivery rule for checks under certain of the Section 547(c) defenses is contrary to the legal reality that a check does not operate as an assignment of funds until it is honored. *See, e.g., Johnson v. Barnhill, supra*, 931 F.2d at 693, quoting and discussing H.R. Rep. No. 595, 95th Cong. 1st Sess. 373, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6329.

The final reason advanced by Petitioner for granting review is to create a uniform rule of the effective date a check is transferred under all provisions of Section 547. However, there is no issue on appeal regarding Section 547(c). While there may be a *de facto* uniform rule (lower court decisions generally appear to hold that transfer occurs when a check is delivered under certain Section 547(c) defenses) if Petitioner is successful before this Court, there is no basis for ruling upon Section 547(c) in this proceeding.

Additionally, it is unlikely that any uniform rule was intended by Congress in promulgating Section 547. The decisions adopting the date of honor approach under Section 547(c) defenses typically rely upon the express legislative history or that subsection. *See, e.g., Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986); and, *O'Neill v. Nestle Libby P.R., Inc.*, 729 F.2d 35, 37 (1st Cir. 1984). As is discussed above, the legislative history clearly acknowledges that the date of delivery approach is adopted for purposes of the certain of the Section 547(c) defenses is an exception to the normal rule. Assuming that the legislative history is controlling as to certain Section 547(c) de-

fenses on this issue, the better reasoned approach is that Congress did not intend "a unitary concept" of transfer by check for the various subsections of Section 547. *Gold Coast Seed Co. v. Spokane Seed Co.* (*In re Gold Coast Seed Co.*), 30 Bankr. 551, 553 (Bankr. 9th Cir. 1983). *See also Kroh Brothers Development Co. v. Continental Construction Engineers* (*Matter of Kroh Brothers Development Co.*), 930 F.2d 648, 651 (8th Cir. 1991); and *New York City Shoes, Inc. v. Bentley International, Inc.* (*In re New York City Shoes, Inc.*), 880 F.2d 679, 681 n.2 (3rd Cir. 1989) (both noting approvingly decisions which hold that the "completely different" purposes of these subsections require different rules).

## CONCLUSION

The only reason for granting a Writ of Certiorari in this case would be if this Court wishes to exercise its discretion to resolve a conflict among certain United States Court of Appeals. For reasons enunciated in its opinion, the decision of the United States Court of Appeals below was correct and does not require review.

WHEREFORE Respondent respectfully prays that a Writ of Certiorari not be granted.

Respectfully submitted,

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